FILED
JUL 1 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 193

NORMAN BAKER, PETITIONER,

VS.

THE STATE OF ARKANSAS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

A. G. BUSH,
Davenport, Iowa,
W. R. DONHAM,
Little Rock, Arkansas,
Counsel for Petitioner.

A. G. BUSH,
Of Counsel.

INDEX

PETITION FOR WRIT OF CERTIORARI

A. Summary Statement of the Matter Involved 1
Demurrer 3
Motion to quash 3
Plea 4
Basis upon which it is contended that this court has jurisdiction to review the judgment in question 5

B. Reasons Relied On for the Allowance of the Writ 7

BRIEF OF PETITIONER IN SUPPORT OF THE FOREGOING PETITION FOR WRIT OF CERTIORARI

I. Right of Accused to Due Process of Law in Criminal Case 10
Notice of nature and cause of the accusation essential 10

II. Plea of Truth Not an Admission of Publication 13

TABLE OF CASES

Berger vs. U. S., 295 U. S. 78, 79 L. Ed. 1314 10
Byrd vs. State, 38 Tex. Cr. R. 630, 44 S. W. 529 11
Grimm vs. U. S., 156 U. S. 604, 39 L. Ed. 550 10
Grimsley vs. U. S., 50 F. 2d 509 10
Hagner vs. U. S., 285 U. S. 427, 76 L. Ed. 861 10
Jackson vs. State, ... Tex. Cr. R. ....., 77 S. W. 223 12
McKie vs. State, 37 Tex. Cr. R. 544, 40 S. W. 305 11
Montana R. Co. vs. Warren, 137 U. S. 348 10
Nordhaus vs. State, (Tex. Cr. App.) 40 S. W. 804 11
Pool vs. State, 103 Tex. Cr. R. 90, 280 S. W. 214 11
Potter vs. State, 267 S. W. 486, 99 Tex. Cr. R. 47 11

Potter vs. State, 86 Tex. Cr. R. 380, 216 S. W. 886 ... 11
Rosen vs. U. S., 161 U. S. 29, 40 L. Ed. 606 ... 10
Squires vs. State, 39 Tex. Cr. R. 96, 45 S. W. 147 ... 11
Sorrells vs. U. S., 287 U. S. 435, 77 L. Ed. 413 ... 15
U. S. vs. Callender, 25 Fed. Cas., p. 239, No. 14709 ... 12
U. S. vs. Cruikshank, 92 U. S. 542, 23 L. Ed. 588 ... 10
U. S. vs. Murdock, 284 U. S. 141, 76 L. Ed. 210 ... 15
Woost vs. Herberger, ... Minn. ....., 283 N. W. 121 ... 14, 15
14 Amer. Jurisprudence, page 946 ... 13-14

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

NORMAN BAKER, PETITIONER,

VS.

THE STATE OF ARKANSAS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of Norman Baker respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

That Norman Baker is and at all times mentioned herein was a citizen of the United States residing at Eureka Springs, Arkansas; that on June 17, 1939, an information against him was filed by John K. Butt, prose-

cuting attorney of the Fourth Judicial Circuit in the Circuit Court of the Western District of Carroll County, Arkansas (Record p. 2), purporting to charge defendant with the crime of criminal libel comprising an open letter alleged to have been written, printed and published concerning Ray Freeman and Mrs. Ray Freeman and alleged to contain language tending to impeach their honesty, integrity, veracity and reputation, which letter filled four pages of the printed record, contained twelve different paragraphs containing a thousand or eleven hundred words (Record pp. 2-5). One of the statements was

> "I charge you with telling prospective patients, who stopped at your camp, discriminating statements in an effort to turn them back home to discredit the hospital doctors. I charge you with pure falsehoods against the hospital doctors."

This statement was held by the state court to be libelous *per se* in view of the statutory definition of libel. Many other statements in the letter were not libelous, such as

> "You are a business man of this city, Mr. Freeman."
>
> "Own stock in the Berryville Wholesale Grocery."
>
> "You conduct a swimming pool with a charge after the city pool was officially closed."
>
> "You sell groceries to the local grocery stores."
>
> "You used to sell such to the Baker Hospital, who discontinued all business with you."
>
> "Do you realize that every person you turn away from this city means a loss to every business person in town?"

These statements and other nonlibelous statements in the information were all submitted to the jury by the court as a basis for conviction of the crime of libel.

The information contained nothing to indicate which of the statements contained in the alleged libelous letter would be relied upon by the prosecution as constituting libel. The statutes of the State of Arkansas allow the truth of an alleged libel to be shown in justification (Pope's Digest of 1937, Sec. 3017).

Demurrer.

The defendant demurred to the information on the grounds, among others, that

> "2. The information does not state facts sufficient to constitute an offense of criminal libel.
>
> "3. The defendant is a citizen of the United States. A trial and conviction upon the information filed herein would result in depriving him of his liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States" (Record p. 18).

This demurrer was overruled (Record p. 14).

Motion to Quash.

Defendant filed a motion to quash the information (Record p. 19) which was overruled by the court and defendant excepted.

The defendant then filed a motion to require the State to file a bill of particulars setting out the particular language used in the alleged publication upon which it would rely for conviction. This motion was sustained by the lower court (Record p. 15), but the prosecuting attorney failed to comply with it, but did file a purported bill of particulars, same being merely a literal copy of the complete article set out in the information (Record p. 22). Defendant moved to strike the bill of particulars because not complying with the requirements of the court, but this motion was overruled, and defendant excepted.

Plea.

The defendant pleaded:

"1. That he is not guilty.

"2. That the alleged defamatory statements are true.

"5. That defendant is a citizen of the United States. A trial and conviction upon the information filed herein would result in depriving him of his liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States" (Record p. 7).

Trial was had to the jury which found a verdict of guilty and fixed defendant's punishment at a fine of $2,500.

Defendant filed a motion for new trial (Record p. 26) one ground of which was that conviction and sentence would deprive him of property and liberty in violation of the Fourteenth Amendment to the Constitution of the United States. This motion was overruled by the court.

Judgment was entered upon the verdict sentencing defendant to pay a fine of $2,500 and from that judgment an appeal was taken to the Supreme Court of Arkansas. The Supreme Court of Arkansas on February 19, 1940, affirmed the judgment of the lower court (Record p. 177) and on April 1, 1940, denied appellant's petition for rehearing (Record p. 193) which had been duly filed on March 6, 1940 (Record p. 191), thereby causing said judgment to become final on April 1, 1940.

This petition asks that the judgment of the Supreme Court of Arkansas affirming the judgment of the Circuit Court of the Western District of Carroll County be reversed.

Basis upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

It is believed that Sec. 344(b) of Title 28, U. S. Code (Jud. Code, Sec. 237(b), as amended; also Act of February 13, 1925), makes it competent for this court by certiorari to require the judgment of the Arkansas Supreme Court drawn in question in this proceeding to be certified to it because in this case both in the lower court and in the state Supreme Court petitioner set up and claimed the title, right, privilege and immunity under the Fourteenth Amendment to the Constitution of the United States, of being fully informed as to the nature of the charge against him and being informed as to the particular portions of the alleged libelous article set out in the information therein upon which the State would rely for conviction. The particular manner in which such claim was made is set out in the first division of this petition.

This petition presents the following federal questions as to defendant's right to due process of law:

1. Are the requirements of due process of law under the Fourteenth Amendment to the Constitution of the United States met or conformed to by trial, conviction and sentence to a heavy fine in a state court, upon an information seeking to charge the statutory crime of libel by alleging that defendant published a long printed article (Record p. 2) of nearly eleven hundred words, containing many paragraphs and sentences which were not libelous at all and were not and could not be properly construed as libelous, even though one or more sentences were held to constitute libel *per se*, the prosecuting attorney, though required by order of the court to furnish a bill of particulars informing defendant as to the particular portions of said alleged libelous article on which the prosecution

would rely, having failed to furnish defendant with that information or any information as to the particular paragraphs or sentences relied on for conviction, and such information not being contained in the information itself, and the instructions of the court permitting and directing the jury to convict defendant if it found that defendant wrote or published the charges contained in such article (Record p. 155), with no instructions singling out and calling to the attention of the jury, as a basis for conviction, the only portions or sentences of said alleged article which could properly be held to constitute libel or were so held by the state court?

2. A further question arises upon the opinion of the state court in affirming the judgment of the lower court in holding that defendant's plea of the truth of the alleged libelous statement and the introduction of evidence to that effect, constituted a waiver of his general plea of not guilty or an admission that he had published the article in question. The latter question did not arise upon the record until the state Supreme Court rendered its opinion so holding. This question was then raised by defendant in his petition for rehearing, Grounds 5 and 6 of which are as follows:

> "(5) The court erred in upholding the conviction of the appellant upon the ground that by pleading and proffering evidence of the truth of the alleged libelous article, appellant admitted responsibility for the authorship and publication thereof; because the statutes of Arkansas provide that the truth of an alleged libel may be shown in defense thereof, and, if shown, constitutes a complete defense, and the court's holding in this respect improperly deprived appellant of the benefit of his general plea and defense of 'not guilty' and thereby subjects him to punishment and deprivation of property without due

process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

"(6) The court erred in holding, in effect, that, since the appellant pleaded the truth of the charge as a defense, the State was relieved of the burden of proving the authorship or publication of the newspaper article in question" (Petition for Rehearing p. 2).

The court denied the petition for rehearing without opinion, thereby necessarily ruling against petitioner upon the last-mentioned question (Record p. 193).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The judgment of the lower court as affirmed by the Supreme Court being a final judgment and said Supreme Court being the highest court of the State of Arkansas in which a decision could be had in said cause, involved and denied the right and privilege of due process of law and to the immunity from violation of that right under Article Fourteen of the Constitution of the United States, which right, privilege and immunity was specially set up and claimed by the petitioner in the lower court by demurrer, motion to quash, objections to evidence, motion for directed verdict, and motion for new trial, and in the Supreme Court of Arkansas by appellant's statement of errors and points and by argument in said cause.

2. The state Supreme Court, being the highest court of the State of Arkansas in which a decision could be had, denied to defendant the right and privilege to which he was entitled under the due process provisions of the Fourteenth Amendment to the Constitution of the United States,

viz.: Of having due notice and information of the nature and cause of the charge against him and of the particular portions of the alleged libelous article upon which the government would rely, and was thereby deprived of the opportunity of proving the truth of the various statements contained in said article which were submitted by the trial court to the jury as a basis for conviction, said petitioner having proven the truth of the charge that falsehoods concerning the hospital doctors had been told by the persons named in the alleged article and not having any reason to believe that it would be necessary to prove the truth of the other statements contained in said alleged libel.

3. The state Supreme Court, being the highest court in the State of Arkansas in which a decision thereon could be made, sustained the conviction and judgment of the lower court upon the erroneous ground that pleading and attempting to prove the truth of the one statement held by that court to constitute libel *per se*, constituted in effect a waiver of defendant's general plea of not guilty and constituted an admission that he wrote and published or caused to be written and published the alleged libel and thereby denied to defendant his right and privilege to a fair trial and to due process of law under the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of Arkansas, in its decisions above set out, decided federal questions of substance which had not theretofore been determined precisely by this court, viz.: That the information in question, and trial thereon, were sufficient to constitute due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of Arkansas by its decisions above set out determined federal questions, viz.: Whether

said information and trial constituted due process of law, in a way probably not in accord with the principles of many decisions of this court applicable thereto.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Arkansas Supreme Court, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 4148, *Norman Baker, Appellant,* v. *The State of Arkansas, Appellee* (appeal from Carroll County Circuit Court, Western District), and that the said judgment of the Arkansas Supreme Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

W. R. DONHAM,
Little Rock, Arkansas,
A. G. BUSH,
Davenport, Iowa,
Counsel for Petitioner.

Petitioner files herewith certified copy of the record in the Supreme Court of Arkansas, certified copy of printed abstract for appellant filed in the Supreme Court of Arkansas, certified copy of the argument and petition for rehearing filed in the Supreme Court of Arkansas, ten copies of the printed record in the Supreme Court of Arkansas, and also supporting brief of petitioner.

A. G. BUSH,
Of Counsel.

I.

RIGHT OF ACCUSED TO DUE PROCESS OF LAW IN CRIMINAL CASE.

Petitioner's right, privilege and immunity under the due process clause of the fourteenth amendment was specifically claimed in the lower court by Ground 3 of the demurrer (Abst. p. 7; Tr. p. 18), as one of the grounds of the motion to quash the information (Abst. p. 8; Tr. p. 19), by motion for bill of particulars (Abst. p. 9; Tr. p. 20) to require the State to set out "the particular language used in the alleged publication upon which it relies for conviction," by defendant's objection to the introduction of evidence (Abst. p. 11; Tr. p. 39), by motion to direct a verdict at the close of the State's evidence (Abst. p. 41; Tr. p. 107), and again at the close of all the evidence (Abst. p. 72; Tr. p. 153); also by motion for new trial (Abst. p. 94).

Notice of Nature and Cause of the Accusation Essential.

The accused has the constitutional right to be informed of the nature and causes of the accusation.

U. S. v. *Cruikshank*, 92 U. S. 542, 23 L. Ed. 588.

Berger v. *U. S.*, 295 U. S. 78, 79 L. Ed. 1314.

Hagner v. *U. S.*, 285 U. S. 427, 76 L. Ed. 861.

Rosen v. *U. S.*, 161 U. S. 29, 40 L. Ed. 606 (see particularly all cases cited in dissenting opinion).

Montana R. Co. v. *Warren*, 137 U. S. 348, 351.

Grimm v. *U. S.*, 156 U. S. 604, 39 L. Ed. 550.

"He has a substantive right to be informed by the information in simple, understandable language * * * in sufficient detail to enable him to prepare his defense."

Grimsley v. *U. S.*, 50 F. 2d 509.

An information or indictment for libel based upon a long publication must specify the parts relied upon as constituting libel.

Pool v. *State*, 103 Tex. Cr. R. 90, 280 S. W. 214.
Potter v. *State*, 267 S. W. 486, 99 Tex. Cr. R. 47.
Nordhaus v. *State*, (Tex. Cr. App.) 40 S. W. 804.
McKie v. *State*, 37 Tex. Cr. R. 544, 40 S. W. 305.
Byrd v. *State*, 38 Tex. Cr. R. 630, 44 S. W. 529.
Squires v. *State*, 39 Tex. Cr. R. 96, 45 S. W. 147, 73 Am. St. Rep. 904.
Potter v. *State*, 86 Tex. Cr. R. 380, 216 S. W. 886.

In *Potter* v. *State*, 99 Tex. Cr. R. 47, 267 S. W. 486, the court said:

> "It is not enough to set out such lengthy articles containing much matter which is clearly not libelous, but that there should be innuendo, explanatory or directory averment, so that the accused primarily, and the courts before whom he has been haled secondarily, may focus their attention on *the very language deemed objectionable*, and prepare and try the case with *such pointed issue* before them, and that they may not be compelled *to seek* here and there or try out this vagrant expression or *sift those dubious words* in an effort to arrive at what may be finally claimed by the prosecutor as the libelous utterance. *Nordhaus* v. *State*, (Tex. Cr. App.) 40 S. W. 804; *McKie* v. *State*, 37 Tex. Cr. R. 544, 40 S. W. 305; *Byrd* v. *State*, 38 Tex. Cr. R. 630, 44 S. W. 521; *Squires* v. *State*, 39 Tex. Cr. R. 96, 45 S. W. 147, 73 Am. St. Rep. 904; *Potter* v. *State*, 86 Tex. Cr. R. 380, 216 S. W. 886.
>
> "The complaint and information failing to point out by such necessary averment the particular language claimed to be libelous, the state's pleading is bad, and the judgment will be reversed, and the prosecution ordered dismissed."

In *Jackson* v. *State*, ... Tex. Cr. R. ..... (this case apparently was not printed in the state reports), 77 S. W. 223-224, on rehearing reversing the former opinion, it is said:

> "The information set out *in haec verba* an article alleged to have appeared in the Austin Statesman which covers some four pages of the transcript. * * *
>
> "* * *
>
> "We are simply holding that where the article is lengthy and contains matter that is libelous, with much that is not, the libelous matter should be singled out and the prosecution based thereon. Because the information was defective in this respect, the judgment is reversed."

While we have not found a case where the Supreme Court of the United States has decided the precise questions we are now submitting to you, it is obvious that the decision of the state court was contrary to the principles laid down in the cases from this court which we have cited and many other cases to the same effect.

The question of the requirements of an indictment or information charging libel are discussed to a considerable extent in *U. S.* v. *Callender*, 25 Fed. Cas., p. 239, Case No. 14709. That case shows that it was not only the recognized practice in the United States to require an indictment to set out the particular portions of a book or other extended publication which were charged to be libelous, but also shows that the same practice had prevailed in England for a great many years.

In the petition we quote a few of the nonlibelous statements. These and many others are very clearly not libelous. Yet, they were submitted to the jury as a basis for conviction. Suppose the verdict had said, "We find the defendant guilty of libel because he published, 'You used to sell such to the Baker Hospital, who discon-

tinued all business with you,' or 'Do you realize that every person you turn away from this city means a loss to every business person in town?' " Obviously such a verdict would be instantly set aside by the court. Yet, that is exactly what the court's instructions permitted the jury to find.

Obviously no one can say the jury did not base their verdict upon one of the nonlibelous statements, for there was ample evidence to show that the only libelous statement, viz.: the charge of falsehood, was true, and, if true, there was nothing else in the article which would justify conviction for libel.

To be tried and convicted upon an information which would permit such a result, we believe constituted a want of that due process of law which the Constitution guarantees and to which appellant, as a citizen of the United States, was entitled.

II.

PLEA OF TRUTH NOT AN ADMISSION OF PUBLICATION.

It is almost too clear for argument that to plead that the statements contained in an alleged libelous publication were true cannot of itself constitute an admission of the publication of the libel. Of course the plea might confess the publication, but there is nothing in the nature of a confession in the plea involved here. Whether or not it was necessary for defendant to enter a special plea that the matter published was true is not important. As a matter of fact, such a plea was made.

It appears to be the settled rule that such plea, if not attacked by demurrer or motion, goes to the jury to be tried as a question of fact. In 14 American Jurisprudence, page 946, it is said:

"A plea is subject to either a demurrer or a motion to strike from the records; and if neither is interposed, issue must be taken on the plea and it goes before the jury on the question of fact."

While we have not found a case in this court applying this rule to criminal proceedings, there is ample authority that a plea of the truth of an alleged libel is not inconsistent with a denial of the publication thereof. For illustration, in *Woost* v. *Herberger*, ... Minn. ....., 283 N. W. 121, it is said:

"* * * in slander cases defendant has statutory permission to 'allege, in his answer, both the truth of the matter charged as defamatory and any circumstances in mitigation of damages.' Mason's Minn. St., 1927, Sec. 9275.

"It is no proof of inconsistency that establishment of one of two defenses makes the other unnecessary. *Gammon* v. *Ganfield*, 42 Minn. 368, 44 N. W. 125; *Backdahl* v. *Grand Lodge*, 46 Minn. 61, 48 N. W. 454; *Rees* v. *Storms*, 101 Minn. 381, 112 N. W. 419. Inconsistency comes in only when proof of one *necessarily disproves* the other. *Minneapolis Threshing Mach. Co.* v. *Peters*, 112 Minn. 429, 128 N. W. 578. And then the defenses must be inconsistent in fact.

"(2) Applying these tests to this case, there is no trace of real inconsistency. What defendant asserts by his combination of general denial and averment of truth is simply this: 'I deny making the statements charged. But, whether I made them or not, the truth is as they make it appear to be.' The two should stand, and defendant be permitted to prove either one or both if he has the necessary wherewithal of evidence.

"* * * But the trend of authority and, in our view, all the reason of the matter now support 'the rule that the pleas are consistent since *both may be*

true, and that they may be joined in the same answer without objection.' Ann. Cas. 1917C, 737, 738. See, also, *Cole* v. *Woodson*, 32 Kan. 272, 4 Pac. 321."

The principle of this case is supported by *U. S.* v. *Murdock*, 284 U. S. 141, 76 L. Ed. 210, and also by *Sorrells* v. *U. S.*, 287 U. S. 435, 77 L. Ed. 413. In the latter case it was held that the defense of entrapment could be raised under a general plea of not guilty and the reasoning of that case would clearly indicate that such a plea could not be considered an admission of guilt. See, also, *Woost* v. *Herberger*, ... Minn. ....., 283 N. W. 121.

The principle is applicable to the case at bar and we contend that the holding of the State Supreme Court that by pleading the truth of the charge defendant admitted the publication of the alleged libel, amounted to a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States and therefore should be set aside. The fact that this question arose upon petition for rehearing makes no difference with the rule applicable and the certified copy of petitioner's petition for rehearing attached hereto shows that the question of constitutionality was definitely raised there (see pages 2 and 7), and that overruling the petition for rehearing necessarily decided that question adversely to applicant.

Respectfully submitted,

A. G. BUSH,
Davenport, Iowa,
W. R. DONHAM,
Little Rock, Arkansas,
Counsel for Petitioner.

A. G. BUSH,
Of Counsel.